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IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1966.

No. 1261

ROBERT RIMERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Robert Rimerman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above case on March 14, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is presented in Appendix "A" hereto (p. 17).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 14, 1967 (Appendix "A", infra, p. 27). The jurisdiction of this Court is invoked under U. S. C. Section 1254.

QUESTION PRESENTED.

Whether the statute removing the common law interest disqualification of a criminal defendant as a witness permits the trial court in its jury instructions to single out the defendant's interest in the outcome of the case.

STATUTE INVOLVED.

18 U. S. C. A., § 3481, provides:

> "In trial of all persons charged with the commission of offenses against the United States * * * the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

STATEMENT OF CASE.

Appellant was indicted on two counts. Count I charged the Appellant with violating Section 472, Title 18, U. S. Code, by keeping in his possession and concealing certain falsely made, forged and counterfeited obligations of the United States with intent to defraud and with knowledge that said notes were falsely made, forged and counterfeited. The second count charged the Appellant with violating Section 473, Title 18, U. S. Code by selling, transferring and delivering to Stephen Wood forged and counterfeited obligations of the United States, with the intent that they be passed, published and used as true and genuine notes, knowing said notes to be falsely made, forged and counterfeited.

At the trial the Government's chief witness was Stephen E. Wood, a bank teller at the Jefferson Bank and Trust Company (R. 9). The substance of Wood's testimony was as follows: On October 18, 1965 at approximately 10:50 a. m. Appellant came into the bank to make his deposit (R. 10). While so engaged the Appellant gave Wood a bill and asked him to check the bill against the bank's record of counterfeit bills (R. 11). Wood made a notation of the serial number of the bill on an envelope and checked it against those on his list. He then told Appellant that the serial number was not on his list of counterfeit bills (R. 11). Appellant made his deposit, but before he left asked Wood if he would like to make $1,000.00, to which Wood replied "who wouldn't?" Appellant told Wood that a friend of his had $7,000.00 worth of counterfeit bills and that if Wood would pass them through the window, he would get $1,000.00 (R. 11). Wood refused but Appellant advised him to think it over (R. 12). Asked if he remembered the serial number that he had written on the envelope Wood replied that he did not. Over the objection of Appellant, Wood was permitted to read the serial number from the envelope upon which he had made the notation (R. 13). Appellant left, and Wood reported what had transpired to his immediate superior, the bank's auditor William G. Gronek (R. 15). A report was made to the Secret Service (R. 16). At approximately 2:30 the same day Appellant called Wood but Wood was not there. Wood returned Appellant's call and told Appellant that he had thought the deal over and he would take it (R. 17). The following day Wood again called Appellant at his store and told him the deal was still on. Appellant told Wood that the deal had changed because "his buddy had skipped" leaving only $1,500.00 in counterfeit bills (R. 18). At approximately 6:20 p. m. the same day Appellant called Wood and said that he would bring $300.00 in $10.00 bills to the bank on Thursday which he would give to

Wood in exchange for six $50.00 bills (R. 19). The following evening, October 20, 1965, Wood called Appellant on the telephone and asked if the deal was still on. Appellant replied in the affirmative, Wood was to receive, $50.00 to effect the exchange (R. 20). On Thursday, October 21, 1965, Appellant came into the bank at approximately 11:15 a. m. and made his usual deposit of receipts from his store. He also cashed three checks. At this time Appellant gave Wood thirty $10.00 bills and a deck of cards (R. 21). Wood in turn gave Appellant six $50.00 bills which Wood had gotten from the Secret Service (R. 22) and Appellant returned one of the $50.00 bills to Wood (R. 27). The serial number of the six $50.00 bills that were given to Appellant in exchange for the thirty $10.00 bills had been recorded by two secret service agents and Gronek on a list which was identified as Exhibit 8 (R. 24). Wood identified Government's Exhibits 9-38 which purported to be the $10.00 bills which Appellant had given to him in exchange for the six $50.00 bills (R. 28).

On cross-examination Wood stated that he did not know Appellant socially, had had no prior business transactions with him (R. 29), and had previously had no conversations with Appellant other than relating to the Appellant's bank deposits (R. 30). He stated that on October 18, Appellant had just walked in and asked him how he would like to make some money (R. 30). On further cross-examination the witness admitted that on October 18 he had told Appellant that he, Wood, was going to have a birthday and also that he had planned to take a trip to Chicago (R. 31). He denied, however, that he asked to borrow any money from Appellant (R. 31).

The Government's second witness was William G. Gronek, the bank's auditor, who testified only to identify Exhibit 1 (R. 35).

The Government then presented the testimony of Richard W. Taylor, Arthur Henry Allen and Gary W. Stigal, the three Secret Service agents who worked on the case. Taylor testified that he gave the six $50.00 bills to Wood (R. 38) after having made a notation of the serial numbers of the six $50.00 bills on Exhibit 39 (R. 39). He also testified that he received the thirty $10.00 bills from Wood after they had allegedly been given to Wood in exchange for the six $50,00 bills. Allen and Stigal both testified that they (in the company of Taylor) arrested Appellant at his store on October 31, 1965 (R. 44, 49) and took him to the Federal Building where he was searched (R. 44, 49). They both stated that they found Exhibits 3-7 in Appellant's wallet (R. 44, 54). Both stated that Appellant was cooperative, did not resist search and gave his wallet to them upon request (R. 46, 53). The Government then attempted to qualify Stigal as an expert on counterfeit bills and over Appellant's objection Stigal, examining the bills constituting Government's Exhibits 9-38, testified that the bill was in fact bogus (R. 51).

The Government offered Exhibits 1-39 for identification and examination by the jury (R. 55). The Court sustained Appellant's objection with respect to Exhibit 1 because the serial number on the envelope had already been read to the jury. Exhibits 2-39, however, were permitted to be examined by the jury (R. 56).

The defense first presented the testimony of Rabbi Ephraim Epstein, who stated that he had known Appellant for twenty-six years, and Selig James Resnick and David Pastor, both of whom had known Appellant for twenty years. Rabbi Ephraim stated that he had officiated at Appellant's wedding. All three testified that Appellant was an honest devoted father and husband and enjoyed an excellent reputation in the community (R. 57-62).

The only other evidence presented by Appellant and the only evidence controverting charges in the indictment

was testimony of Appellant himself. Appellant testified that he was a grocer and butcher and had operated the grocery store in the same location for over twenty years and had done business at the Jefferson Bank from the day he opened his store (R. 65). He is married, has two children, a son eighteen and a daughter fourteen. Appellant is forty-eight years old and is a World War II veteran, having served honorably in the Army for five years and five days.[1] Appellant has never been convicted of any crime or been in any trouble with the law of any kind previous to the offense charged (R. 76). The substance of the balance of Appellant's testimony was as follows: Appellant knew Wood through his association with the bank because Wood was at the first window by the door and where Appellant normally made his deposits (R. 66). On October 18, 1965, Appellant made his usual Monday morning deposit but one of the bills did not feel right and he asked Wood to examine it to see whether it was all right. Wood checked his sheet and told Appellant that the bill was all right and returned it to Appellant. Appellant took the bill back to the store, put it in his cash register and disposed of it in the normal course of his business (R. 66-67). While at the bank, Appellant engaged Wood in conversation during the course of which Wood told Appellant that it was his birthday, and that while he had eleven brothers and sisters he had nothing to do with any of them, so some of his friends were giving him a birthday party (R. 67). Appellant told Wood that October 18 also happened to be the Jewish Holiday of Simchas Torah but that after he returned from the synagogue, he would drop over and have a birthday drink with Wood if Wood told Appellant where he lived. Wood gave Appellant his address and told him that he would be back from the party his friends were giving by 9 o'clock that evening. Appellant asked

[1] Appellant received a bronze star for valor for his services in the War (R. 135).

Wood for his phone number and told him that he and his wife would call first and then come over (R. 67). Wood then told Appellant that he wanted to go out of town for the week-end but that he had no money. Appellant asked Wood how much money he would require. Wood replied that he could make it on about $50.00 (R. 68). That evening Appellant called Wood as he had promised to do, but was informed by Wood's roommate that Wood hadn't returned. Appellant left a message for Wood to call him Tuesday morning (R. 69). On Tuesday morning Wood called Appellant and told him that he had gone to a party in East St. Louis and he didn't get home until 2:00 a. m. and that he was extremely hung over. There was no conversation about any money or bills at that time (R. 70). Appellant did not talk to anybody at the bank on Wednesday (R. 70). On Thursday Appellant went to the bank, but first called and asked Wood to check the Appellant's balance because he wanted to cash some checks. It was the bank's policy not to cash checks unless there was sufficient money in the account to cover the checks cashed (R. 70). At this time Appellant told Wood to have six $50.00 bills ready for him because someone had paid him some money in $10.00 bills and he wanted the bills changed for larger bills. Wood then reminded Appellant of the $50.00 that Appellant had promised to lend to him (R. 71). Appellant received the thirty $10.00 bills from one Dallas Barr, a salesman, who had sold Appellant some Christmas merchandise from a Chicago discount house. Appellant had paid Barr in advance but the merchandise consisting of appliances, irons, mixers, toasters, radios, jewelry and watches was never delivered (R. 72). Appellant had repeatedly asked Barr for the return of the money. On October 18 Barr came to the Appellant's store and repaid Appellant one-half of the money that Appellant had advanced. He gave Appellant thirty $10.00 bills (R. 72). Defendant took these bills to the bank to exchange them for $50.00 bills

because he was saving for a refrigerator and as he did not have a safety deposit box. His method in saving was to convert the saved money into bills of large denominations to reduce bulk and avoid the temptation of spending (R. 73). Appellant categorically denied that he had made any overtures to Wood to pass counterfeit money (R. 68-69, 75-76) or that he knew the bills were counterfeit (R. 74). He never looked at the numbers of the bills (R. 74).

The Court overruled Appellant's motions for judgment for acquittal both at the close of the Government's case (R. 57) and at the close of the entire case (R. 87). The Court then charged the jury. Among the charges given to the jury were the following two instructions:

> "When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all of the obligations of a witness, and his testimony is to be treated like the testimony of any other witness, that is to say, it will be for you to say, remembering the matter of his testimony and the manner in which he gave it, his cross-examination and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have a perfect right to do so and it is your duty to do so, the interest the defendant has in the outcome of this case" (R. 125).

A specific objection to this instruction was made by defense counsel as follows:

> "Further objection is made to the part of the instruction referring to the defendant as a witness in the defendant's interest. I think that this instruction emphasizes the interest of the defendant and tends to disparage his testimony" (R. 130).

In addition to the above instruction relating to Appellant's credibility alone, the Court instructed generally on

credibility, and gave three instructions relating to credibility of the witnesses.

> "You are the sole judges of the credibility of the witnesses and the weight to be given to their evidence. In weighing and reconciling the testimony, you should look to the demeanor and the manner of the witness testifying, his willingness or unwillingness to answer; to the lack of interest, or interest, of any witness in the case; to the relationship of any witness to the parties in the case; to the means of knowledge or lack of knowledge of the facts about which the witness testifies; to the opportunity of the witness to know the facts about which he purports to testify; to the reasonableness or unreasonableness of the testimony of the witness; to its probability or improbability, and whether the witness has made contradictory statements or not, about material matters involved in this case; and having thus carefully considered all the matters, you must fix the weight and value of testimony of each and every witness and of the evidence as a whole" (R. 126).
>
> . . . . . .
>
> "In this case you must, of course, bear in mind that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, as well as all the evidence and the facts and circumstances detailed before you and which have been presented in this trial, . . ." (R. 114).
>
> . . . . . .
>
> "If you should conclude that a witness has willfully testified falsely to some material matter in this case, you should consider that in determining the credibility of the rest of such witness' testimony, and you are at liberty to reject all of such witness' testimony, as well as the part which you feel to have been willfully false" (R. 127).

The jury found the defendant guilty on both counts of the indictment (R. 131). Thereupon, the defendant was sentenced to imprisonment for thirty months on Count I and the same on Count II. The sentence on Count II to run concurrently with that on Count I (R. 137).

REASONS FOR GRANTING THE WRIT.

18 U. S. C. No. 3481 removes the common law disqualification for interest and establishes the defendant in a criminal case as a competent witness in his own behalf, should he desire to testify. However, should he wish to remain silent, he may do so without prejudicing his Constitutional rights, and the prosecutor may not comment on his silence nor should his silence be considered as removing from him the presumption of his innocence, which remains with him throughout his trial. Therefore, under the law, in effect, the defendant has the option to remain silent under these circumstances or to testify retaining in each instance his presumption of innocence and a complete freedom from being singled out with adverse comment by Judge or Prosecutor for the choice he has made.

The petitioner has no quarrel with a general instruction pertaining to the credibility of all witnesses, which, of course, includes the defendant should he desire to testify. However, in the case herein the trial court gave an additional instruction (R 125) aimed at and pointed directly to the testimony of the defendant, who had exercised his lawful right to testify in his own behalf. This instruction informed the jury that the defendant could take the witness stand subject to all the obligations of the other witnesses, and then the Trial Court further precisely and emphatically stated, "Then, again, it is for you **to remember**, you have a perfect right to do so and it is your duty to do so, **the interest the defendant has in the outcome of the case.**" What the Trial

Judge in effect did was to penalize the defendant for taking the witness stand in his own behalf. Had the accused remained silent, no comment by the Court or by the prosecutor would have been permissible under the law, except to state that the failure of the accused to testify created no presumption against him. But here the Court tells the jury that if the defendant takes the witness stand in his behalf, that they should consider his interest in the outcome of the case. With this instruction the Trial Judge thereby destroys the presumption of innocence that was the defendant's before he testified and informs the jury that if the defendant testified, that defendant's testimony is of less value than that of the other witnesses because the defendant is interested in the outcome of his case. As a result of the action by the trial judge, out of the case and the minds of the jury went defendant's constitutional guarantee of his right to be presumed innocent until proven quilty. His right to testify had lost its basic value and been degraded and over-shadowed by the Court's instruction, solely because he was the defendant, proved guilty or not. The presumption of his innocence, which was to remain with him throughout the trial, was with this one fell swoop by the trial judge severely lessened and taken from him when the Court downgraded his testimony as a witness solely because he had exercised his Constitutional privilege to testify as a witness in his own behalf.

Over seventy (70) years ago, in **Reagan v. United States, 157 U. S. 301**, this Court approved an instruction which permitted a trial judge in a criminal case to instruct the jury that, apart and distinct from other witnesses, the deep personal interest of a defendant may color his testimony. Shortly thereafter, in **Allison v. United States, 160 U. S. 203**, this Court greatly tempered the opinion previously expressed in the Reagan case and stated:

"It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by law."

More recently in **Quercia v. United States, 289 U. S. 466,** in disapproving a crude commentary by a trial judge which was one-sided against the defendant, this Court quoted the above language from **Allison v. United States,** and held that a trial judge may not single out a defendant's testimony and imply that it is not worthy of belief. This opinion is more in accordance with the case of **Hicks v. United States, 150 U. S. 442,** decided shortly before **Reagan v. United States,** and more compatible with the rights to be accorded an accused under our Constitution. The Court in **Hicks** stated in this respect, "Still it must be remembered that men testify truthfully, although their lives may hang in the balance, and that the law in its wisdom has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great deal of weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise be a competent witness'. The policy of this enactment should not be defeated by hostile comments of the trial judge whose duty it is to give reasonable effect and force to the law."

Reagan v. United States did not actually overrule **Hicks v. United States,** but held within the guideline of Hicks the instruction in **Reagan** was not prejudicial. Yet, for over seventy (70) years the United States Court of Ap-

peals, and particularly the Eighth Circuit, have allegedly interpreted the Reagan case to have held that instructions in criminal cases, which single out the testimony of the accused, where he testifies, are not prejudicial even though they pointedly request the jury to **remember the interest the defendant has in the outcome of the case.** It is a vicious instruction which not only invades the province of the jury, but unjustly casts suspicion on the defendant and lessens the weight of his testimony, innocent though he is presumed to be.

In addition to the instructions relating to credibility of witnesses generally and the interest of the Appellant already discussed, the trial court below instructed the jury on credibility of all of the witnesses on two other occasions (R. 114, 127). In all, therefore, there were three instructions given by the trial court to the jury relating to the credibility of all the witnesses in addition to the one singling out the testimony of the Appellant. The jury under the circumstances could only believe that credibility of the witnesses in this case was of paramount importance. Under these circumstances the instruction complained of could have no other effect than to prejudicially disparage Appellant's testimony and deprive him of his right to testimony in his own behalf.

The instruction herein has never received the commendation of any Federal Court. On each occasion where it, or similar cautionary instructions have been used, United States Courts have held it not to be prejudicial but never has its use been recommended. Actually, this type of instruction is seldom given, and most criminal cases involving its use have arisen in the District Court wherein the defendant herein faced trial. It frequently has been the subject of criticism but never of commendation. It serves no purpose other than to comment on the weight of the testimony of the accused. It is predicated

upon a principle inconsistent with the presumption of innocence and carries with it that very inference. There is no justification for such an instruction other than to cast suspicion and weightlessness on the testimony of the accused, and it virtually requests the jury to receive the testimony of the defendant with caution. In doing this, it presumes the guilt of the defendant, for if the defendant were innocent, his testimony would be accepted unqualified by any reservations or epitaphs. After the trial court gives a general instruction (R. 126, 127) on the credibility of witnesses and sets the standard by which their testimony is to be weighed, then to individually point out the defendant, who is equally innocent with the rest, and to admonish the jury to beware what he says, can serve no purpose other than to remove from the defendant his cloak of innocence and to clothe him with one of suspicion and doubt. This action by the trial court not only invades the province of the jury and deprives the defendant of his legal right to testify freely in his own behalf, but in the end result it strips from him the presumption of innocence guaranteed to him by the Constitution of the United States and invades his right to a fair trial which goes hand in hand with it. If there is any justification under the law to the giving of a cautionary instruction pertaining to the testimony of the accused, this defendant is unaware of it. All law and reason indicates it should never be given by any court. In this day when our Courts, and especially this Court, are setting definitive standards for all tribunals and authorities in order to guarantee all citizens equal and full protection under the law, so that their liberties may not be infringed upon or diminished, petitioner feels that this Court, in this light, should once and for all, after many years of silence upon this point, clearly define and indicate within what bounds a trial court may instruct a jury relative to the testimony of a defendant testifying in a criminal

trial. Petitioner is of the opinion that he and all other defendants in similar situations, are entitled to a valuation or revaluation of the law on this point. It is a grave legal and Constitutional question, and it merits the consideration of this Court.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION.

United States Court of Appeals
For the Eighth Circuit.

No. 18,431.

Robert Rimerman, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[March 14, 1967.]

Before Blackmun, Mehaffy and Lay, Circuit Judges.

Mehaffy, Circuit Judge.

Robert Rimerman, defendant-appellant, was tried to a jury and convicted on each of two counts in an indictment charging him in Count I with possessing and concealing counterfeit obligations of the United States in violation of 18 U. S. C. A., § 472, and in Count II with selling, transferring and delivering counterfeit obligations of the United States in violation of 18 U. S. C. A., § 473.[1] Defendant was

[1] 18 U. S. C. A., § 472:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered ob-

sentenced to a term of thirty months on each count, the sentences to run concurrently. We affirm.

Defendant, a grocer, did business with the Jefferson Bank & Trust Company, in St. Louis, Missouri, and was acquainted with Stephen E. Wood, one of the bank tellers. On October 18, 1965, defendant, while making his usual bank deposit, asked Wood to check the genuineness of a ten dollar bill. Wood noted the serial number and upon checking it against the bank's record of counterfeit bills found it authentic. Defendant then asked Wood if he would like to make $1,000 and Wood replied "who wouldn't?" Defendant then told Wood that if he would circulate $7,000 in counterfeit bills through the bank, he would pay him $1,000. Wood refused but defendant told him to think it over. After this conversation, Wood reported it to his superior, the bank auditor, and report was also made to the Uinted States Secret Service. Following this, Wood called defendant and advised that he had decided to accept the offer. Other conversations followed between defendant and Wood in which it appeared that the original scheme had gone awry, but defendant told Wood that he would bring him $300 in ten dollar counterfeit bills in exchange for six fifty dollar bills, agreeing that Wood would be paid $50.00 for making the exchange. This transaction was accordingly made and Wood delivered six fifty dollar bills, which had been marked by the Secret Service. Defendant gave Wood one of the fifty dollar

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ligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

18 U. S. C. A., § 473:

"Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

bills. The serial number on some of the counterfeit bills was the same as that on the bill Wood previously checked as to authenticity. After this transaction, defendant left the bank and returned to his store. Later in the day he was arrested by the Secret Service while possessing the five marked fifty dollar bills.

It is not disputed that defendant possessed and transferred the counterfeit ten dollar bills and received in exchange the fifty dollar bills, one of which he returned to Wood. Defendant, however, denied knowing the ten dollar bills were counterfeit and testified he had received them from a salesman who owed him money. He explains his return of one of the fifty dollar bills to Wood as a loan. Thus, his sole defense to the charge was denial of knowledge that the bills were counterfeit or that he attempted to have Wood circulate them.

Defendant initially contends that the court erred in overruling his motions for judgment of acquittal at the close of the Government's case and at the conclusion of all the evidence. He asserts that a fatal variance exists in the indictment and proof, basing his argument on the Government's failure to prove "concealment" in the first count and "sale" in the second count of the indictment. The statutes denounce the crimes in the disjunctive whereas the indictment charges them in the conjunctive.[2]

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[2] "That on or about the 21st day of October, 1965, in the Eastern Division of the Eastern District of Missouri

ROBERT RIMERMAN,

with intent to defraud, did keep in his possession and conceal certain falsely made, forged and counterfeited obligations of the United States, that is, 15 of what purported to be and were in the likeness and similitude of $10.00 denomination Federal Reserve Notes of the Federal Reserve Bank of Dallas, each bearing serial number KO3175187B, and 15 of what purported to be and were in the likeness and similitude of $10.00 denomination Federal Reserve Notes of the Federal Reserve Bank of Chicago, each bearing serial number G60249264G, he, the said defendant, then and there

In Count I, the indictment charges defendant with knowingly "possessing and concealing" counterfeit bills. The Government made no effort to prove "concealment," but it is undisputed that defendant "possessed" the counterfeit bills. Similarly, the argument is made that the Government did not prove a "sale" as charged in Count II, but here again there is no question but that defendant "transferred and delivered" the counterfeit bills to the bank teller. It was not incumbent upon the Government to prove either the "sale" or "concealment," as it has long been settled that where a crime is denounced disjunctively in the statute but charged conjunctively in the indictment, proof of any one of the allegations will sustain a conviction. As stated in *United States v. Conti,* 361 F. 2d 153, 158 (2nd Cir. 1966):

> "Charging alternative ways of violating a statute in the conjunctive is permissible, and a conviction under such an indictment will be sutsained if the evidence indicates that the statute was violated in any of the ways charged. *Smith v. United States,* 234 F. 2d 385 (5th Cir. 1956)."

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well knowing said notes were falsely made, forged and counterfeited.

"In violation of Section 472, Title 18, United States Code

"— SECOND COUNT —

"The Grand Jury further charges:

"That on or about the 21st day of October, 1965, in the Eastern Division of the Eastern District of Missouri, ROBERT RIMERMAN, did sell, transfer and deliver to Steven Woods, 30 falsely made, forged and counterfeited obligations of the United States, that is, 15 $10.00 denomination Federal Reserve Notes of the Federal Reserve Bank of Dallas, serial number KO3175187B, and 15 $10.00 denomination Federal Reserve notes of the Federal Reserve Bank of Chicago, serial number G60249264G, with intent that same be passed, published and used as true and genuine notes, he, the said defendant, then and there well knowing said notes were falsely made, forged and counterfeited.

"In violation of Section 473, Title 18, United States Code."

Accord, Turf Center, Inc. v. United States, 325 F. 2d 793, 796 (9th Cir. 1963); *Arellanes v. United States,* 302 F. 2d 603, 609 (9th Cir. 1962), cert. denied, 371 U. S. 930 (1962).

Defendant next assigns as error the court's failure to instruct the jury as to the essential elements of the offenses charged. The crux of defendant's argument is that the court failed to define for the jury the operative words of the statutes and indictment—"possess," "conceal," "sell," "passing," and "publishing." It is argued that these words constitute essential elements of the offense and, therefore, must be defined. Defendant neither requested the trial court to make such definitions nor did he object to their omission from the charge. The court included in its charge the relevant parts of the statutes and also read to the jury from the indictment. It was entirely proper for the court to utilize the language of the statute in charging the jury. Speaking for this court in *Williams v. United States,* 328 F. 2d 256, 262 (8th Cir. 1964), Chief Judge Johnsen stated:

> "A court may and generally should, where the law governing a case is expressed in a statute, employ the language of the statute in its instructions. (Citations omitted.) Except where the statute is complex or not expressed in ordinary language—which is not the situation here—any amplification which a party may desire to have made must be the subject of a requested instruction by him."

To the same effect see *Lumetta v. United States,* 362 F. 2d 644, 648 (8th Cir. 1966);[3] *Caldwell v. United States,* 338 F. 2d 385, 391 (8th Cir. 1964).

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[3] In *Lumetta, supra,* this court said:

> "We know of no better way to instruct the jury than by the plain and simple language of the statute. It is proper practice to employ the language of a statute in an instruction when the statute is composed of clear and simple language. (Citations omitted.)"

It must be assumed that the jury had ordinary intelligence and comprehended the plain and simple language of the statutes. In fact, an attempt to explain such simple words as "possess," "conceal," "sell," "pass" and "publish" could well lead to confusion rather than clarification. The late Judge Sanborn, speaking for this court in *Guon v. United States*, 285 F. 2d 140, 142 (8th Cir. 1960), stated:

> "Guon's criticism of the trial court's instructions is without merit. Stated briefly, the contention is that the trial court was required, regardless of any request, to define 'aiding and abetting' and to explain what is meant by the words 'directly or indirectly' as used in the charge. We cannot agree. 'Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion.' (Citation omitted.) Frequently, to attempt to explain understandable language is merely to confuse. If the instructions given cover the case and are correct, that is enough. (Citations omitted.)"

See also and compare *United States v. Allegrucci*, 299 F. 2d 811, 814, 815 (3rd Cir. 1962); *Popeko v. United States*, 294 F. 2d 168 (5th Cir. 1961); *Bohn v. United States*, 260 F. 2d 773 (8th Cir. 1959), cert. denied, 358 U. S. 931 (1959); *United States v. Malfi*, 264 F. 2d 147 (3rd Cir. 1959); *Kahn v. United States*, 251 F. 2d 160, 162 (9th Cir. 1958); *Ramsey v. United States*, 245 F. 2d 295, 296 (9th Cir. 1957); *United States v. Jonikas*, 197 F. 2d 675 (7th Cir. 1952).

By using language of the statutes, the trial court fully instructed the jury on the elements of the crime and certainly should not have undertaken to define simple words, particularly when no request was made for definitions or objection made to the language of the instructions. In any event, defendant is not entitled to a review because

of his noncompliance with Fed. R. Crim. P. 30, 18 U. S. C. A., in failing to raise the question at trial and acquaint the trial court with the grounds for objection.

The court elaborately instructed the jury on the meaning of intent, knowingly, the presumption of innocence, the burden of proof and reasonable doubt, and completely protected all rights of defendant in its charge. Additionally, the court instructed on the Government's position as well as the defendant's.

Finally, defendant assigns as error the giving of the folowing instruction:

> "When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness, that is to say, it will be for you to say, remembering the matter of his testimony and the manner in which he gave it, his cross-examination and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have a perfect right to do so and it is your duty to do so, the interest the defendant has in the outcome of this case."

Defendant candidly calls attention to our approval of similar instructions five times in the last five years in the cases of *Caldwell v. United States, supra; Black v. United States,* 309 F. 2d 331 (8th Cir. 1962); *Hance v. United States,* 299 F. 2d 389 (8th Cir. 1962); *Rizo v. United States,* 295 F. 2d 638 (8th Cir. 1961); *Foley v. United States,* 290 F. 2d 562 (8th Cir. 1961).[4]

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[4] For earlier cases from this circuit, see *Schaefer v. United States,* 265 F. 2d 750 (8th Cir. 1959), cert. denied, 361 U. S. 844 (1959); *Shoulders v. United States,* 218 F. 2d 290 (8th Cir. 1955).

We are urged to reconsider and depart from our prior decisions as it is asserted that the only evidence tending to prove any of the essential elements of the offenses is the testimony of Wood. Thus, defendant rationalizes that guilt or innocence depended solely on the jury's judgment of the credibility of defendant vis-a-vis Wood. But there is more to the Government's case than the bare testimony of Wood. It was the Secret Service Agents who marked the fifty dollar bills; who found them in defendant's possession at the time of his arrest; and who established the counterfeit nature of the ten dollar bills. Obviously, defendant's admissions, as party to the transaction but without knowledge the bills were counterfeit, coupled with testimony of the Secret Service Agents, sufficed to justify the jury's verdict, as the jury was bound to have found that defendant possessed and transferred counterfeit bills. Defendant's explanation as to lack of knowledge of the spuriousness of the bills; where and why he came into possession of them; and his purpose in segregating them from his other funds was questionable and completely devoid of corroboration in details easily corroborated if true, and entitled the jury to disbelieve him. When the testimony of Wood is considered in conjunction with that of the Secret Service Agents and defendant's admissions, it becomes clear that the Government made an extremely strong case for conviction.

Counsel for defendant vigorously and ably argued this issue both in brief and upon oral argument, and are to be commended for their industry and zeal in the representation of their client. We are directed to *Reagan v. United States*, 157 U. S. 301 (1895), as establishing the rule which condones giving of such an instruction, and defendant points out that some of the state cases cited in *Reagan* have since been overruled. But comparison of this instruction with the instructions in the older cases and even with *Reagan, supra*, indicates its innocuousness. For example,

the instruction in *Reagan* was couched in the following language:[5]

> "You should especially look to the interest which the respective witnesses have in the suit or in its result. *Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts.* The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. *The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.*" (Emphasis added.) 157 U. S. at 304.

We are well aware that, as defendant points out, the modern tendency is to afford a criminal defendant every conceivable safeguard, but it cannot be gainsaid that this instruction is not a proper declaration of the law as it only advises of the jury's duty to take into consideration the interest the defendant had in the outcome of this case,

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[5] The Supreme Court in Reagan ruled:

"In the same manner in behalf of the government, the court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

"Tested by these rules we see in the instruction objected to nothing of which complaint can reasonably be made. In the first part it lays down a general rule, applicable to all circumstances, and then in the latter part simply calls attention to the fact that the defendant has a deep personal interest in the result of the suit, and that that should be considered by the jury. There is no declaration nor intimation that the defendant has been untruthful in his testimony. There is only a reference to the jury of the matter of credibility coupled with the declaration that interest in the result is a circumstance to be weighed in its determination. This clearly is unobjectionable." 157 U. S. at 311.

without any suggestion that defendant might or be tempted to testify falsely. We repeat what we said in *Caldwell v. United States, supra:*

> "There is no intimation or inference from the District Court's charge that the defendant here had been untruthful in his testimony. The trial judge properly admonished the jury that in testing defendant's credibility, they were obliged to consider his vital interest in the outcome of the trial." 338 F. 2d at 392.

The judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 18,431.

Robert Rimerman,
Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the Defendant in the said District Court, Robert Rimerman, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days after the date of filing of the mandate of this Court in the said District Court.

March 14, 1967

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk of the United States
Court of Appeals for the
Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1261

ROBERT RIMERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Missouri on two counts of an indictment charging the concealment and sale of counterfeit obligations of the United States in violation of 18 U.S.C. 472 and 473. On April 21, 1966, he was sentenced to imprisonment for thirty months on each count, the terms to run concurrently. The court of appeals affirmed (Pet. App. 17–27).

Petitioner does not challenge the sufficiency of the evidence. On August 18, 1965, he entered the Jefferson Bank and Trust Company (where he regularly banked) and asked a teller, Stephen Wood, to com-

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pare a bill with a list of counterfeit bills regularly recorded at the bank. A comparison was made, and Wood informed petitioner that the bill was not counterfeit. Petitioner then offered Wood $1000 if the latter would circulate $7000 in counterfeit bills. Wood refused the offer, and petitioner told him to think it over (Tr. 9–12).[1] After petitioner left, Wood reported the offer to his superior, who, in turn, notified the Secret Service (Tr. 16). Subsequently, Wood called petitioner and said that he would accept the offer (Tr. 17). It was eventually agreed that petitioner would give Wood $300 in counterfeit $10 bills in exchange for six genuine $50 bills and that Wood would receive $50 for his effort in the transaction (Tr. 18–20). On October 21, petitioner passed the counterfeit money to Wood and received the genuine $50 bills, the serial numbers of which previously had been recorded by Secret Service agents (Tr. 21–28). Shortly thereafter, petitioner was arrested. Five of the marked $50 bills were found in his wallet (Tr. 44, 49).

Petitioner, testifying in his own behalf, denied that he had made any overtures to Wood to pass counterfeit money (Tr. 68–69, 75–76) or that he had been aware that the bills were counterfeit (Tr. 74). He explained that the $10 bills had been given to him by a salesman, and that he had exchanged them for $50 bills because his safe deposit box was not large enough to accommodate the smaller bills (Tr. 71–73). Petitioner further testified that the $50 bill which he had given to Wood was a loan (Tr. 68–70).

[1] "Tr." indicates the transcript of testimony in Volume III of the record filed with the Clerk of this Court.

Petitioner's sole contention is that the court committed error in that, after instructing on the effect of expert testimony and opinion evidence, it charged (Tr. 125):

> When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all of the obligation of a witness, and his testimony is to be treated like the testimony of any other witness, that is to say, it will be for you to say, remembering the matter of his testimony and the manner in which he gave it, his cross-examination and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have the right to do so, and it is your duty to do so, the interest the defendant has in the outcome of this case.

These instructions were followed by instructions pertaining to reputation evidence and credibility (Tr. 125–127).

The court below properly held that the above instructions did not, as petitioner argues, over-emphasize the defendant's interest in the case so as to deprive him of a fair trial. The charge did not intimate that the testimony was untruthful, or that petitioner was incompetent to testify. It in no way deprived petitioner of the presumption of innocence. It was merely a reasonable statement of the factors properly to be considered in judging petitioner's credibility. *Reagan* v. *United States,* 157 U.S. 301; *Caldwell* v. *United States,* 338 F. 2d 385, 392 (C.A. 8), certiorari denied, 380 U.S. 984; *United States* v. *Sullivan,* 329 F. 2d 755 (C.A. 2), certiorari denied, 377 U.S. 1005;

Fisher v. *United States*, 149 F. 2d 28 (C.A.D.C.), affirmed, 328 U.S. 463.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967